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7428

IN THE SUPREME COURT OF THE STATE OF UTAH

RUSSELL W. YOUNG and
SABA O. YOUNG, his wife,
Appellants,

vs.

ELVIS HANSEN and
BONNIE HANSEN, his wife,
Respondents.

Case No.
7428

FILED
JAN 31 1950
Clerk, Supreme Court, Utah

Brief of Respondents

RICH AND ELTON,
Attorneys for Respondents.

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Brief of Respondents

STATEMENT OF FACTS

The purported statement of facts of appellants is a misnomer. At most it is a purported statement of the pleadings and the decision—imperfectly and inadequately stated. The purported facts are strewn through the argument, quoting primarily the testimony of plaintiffs and such portions of the evidence of defendants as they felt suited their particular purpose. In that manner the facts are thrown into the brief in such a hodgepodge manner that it is almost impossible to obtain a "concise statement of the facts" as required by Rule VIII. We shall, therefore, restate the case.

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PLEADINGS

Plaintiffs' amended complaint is one for alleged breach of contract for the sale by defendants to plaintiffs of an undivided one-half interest in certain real property and some pigs, rabbits, chickens and other incidental farm property. Plaintiffs alleged that the sale price of the half interest was to be $9000, payable on November 15, 1948 from the proceeds of a sale of a certain home belonging to plaintiffs at 3348 South State Street, and if the home was not sold by Nov. 15, 1948 that plaintiffs were to pay $50.00 per month until the home was sold, the $50.00 per month to apply upon the purchase price; that there was a $2,000 mortgage on the farm, which defendants were to clear; that it was also a part of the agreement that plaintiffs were to move onto the farm with defendants, and that the parties would enter into a partnership agreement and operate the farm in the raising and sale of rabbits, chickens, pigs, etc., the exact terms of which partnership agreement were to be later determined.

Plaintiffs further alleged that early in July, 1948 the agreement was modified by the parties in the following particulars: That plaintiffs were to pay $4,000 on the purchase price at that time and that upon payment of the $4,000 defendants were to *immediately and forthwith* give plaintiffs a warranty deed and bill of sale to a half interest in the real and personal property and execute a partnership agreement. That plaintiffs thereupon raised the $4,000 by mortgaging the State Street property and paid it to defendants and received an additional credit of $60 for some incidental personal property.

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Plaintiffs further alleged that on or about August 1, 1948 they moved onto the farm and paid certain moneys and expended labor in looking after the pigs, chickens, rabbits, etc.; that defendants then promised that if plaintiffs would wait until November 15, 1948 they would then execute the deed, bill of sale and partnership agreement; but when November 15, 1948 came they did not do so; and that on or about February 15, 1949, after repeated delays, defendants refused to execute the deed, bill of sale and agreement of partnership, or either of them, and refused to execute any papers to carry out the oral understanding, and that defendants have requested plaintiffs to leave the premises.

Plaintiffs prayed judgment for breach of contract, claiming a right to repayment of $4060 plus the value of their labor and expenditures on the pigs, chickens, rabbits, etc., a total of $5,145.93 plus interest.

Thereafter, before trial, the amended complaint was amended by interlineation to include the allegation that plaintiffs were at all times ready and willing to perform their part of said agreement.

To this amended complaint defendants, by their answer, admitted the agreement to sell an undivided one-half interest in the real and personal property for $9,000 payable on or before November 15, 1948; admitted payment of the $4000 plus an additional credit of $60 for the incidental personal property; admitted that a partnership for operation of the property was to be formed; ad-

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mitted that plaintiffs moved onto the property and that the parties operated the property as a *joint enterprise;* and admitted that they refused to deed over the one-half interest in the property for $4,060. They denied the alleged modification of the agreement in July, 1948; denied that they had breached the agreement; and on the other hand alleged that plaintiffs had breached the agreement by failing to pay the balance of the $9,000 and by repudiating the agreement and by demanding the deed and bill of sale upon the basis of the alleged modification requiring the same upon payment of $4060; and by notifying defendants that they were not intending to go ahead with the original agreement as to operation of the farm, etc., and by demanding a return of their money plus damages.

Upon these issues the case went to trial. There was a direct and irreconcilable conflict in the evidence upon the main issues as follows:

(a) Was the original contract modified?

(b) If not, did defendants breach the contract so as to entitle plantiffs to a money judgment as prayed?

The trial court found that the original contract was substantially as pleaded and admitted by both parties; that it called for payment of $9,000 by plaintiffs to defendants on or before November 15, 1948, at which time defendants were to give the deed, bill of sale and make the partnership agreement; that it was agreed that until that time the property should be operated as a joint enterprise, each putting in half and taking out half in expenses

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and net proceeds; that the parties had so operated the property and the net proceeds had been distributed and the livestock had been disposed of; that the original contract had not been modified in July 1948 as alleged by plain tiffs; that plaintiffs failed to pay the balance of the purchase price on or after November 15, 1948 and that during the month of February, 1949 plaintiffs demanded that they be reimbursed for their expenditures; and concluded therefrom that defendants had not violated the agreement; and that plaintiffs were not entitled to a judgment against defendants for breach of agreement; and that a judgment in favor of defendants, "No cause of action" should be entered.

A judgment was entered accordingly.

ARGUMENT

The questions on appeal, therefore, are as follows:

(a) Was there substantial evidence to sustain the findings of fact?

(b) Did the court err in its conclusions of law therefrom?

(c) Did the court err in its rulings with reference to admitting evidence?

At the outset it is well to remember that this is an action at law for breach of contract, for money damages therefor, and that as such the findings of fact of the trial court are to be sustained if supported by competent evidence. Counsel for plaintiffs seems to base his appeal

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upon the erroneous idea that inclusion in his prayer of the stock phrase, "and for such other relief as to the court may seem proper in the premises" has the magic effect of transforming it into an equity case; that on this appeal this court should review the evidence and decide that the trial court should have believed his clients; that the facts were as testified by his clients (in spite of the fact that the trial court did not believe their evidence as against that of defendants); that the trial court or this court should become attorneys for plaintiffs and tell them how to proceed by some action of some kind, or how to amend their pleadings in some hoped-for retrial of this case, so that they as contract violators can get some money damages from defendants who did not violate their contract. That, in substance, is the purpose and hope of this appeal.

In this connection it will be observed that the defendants never declared a default in the contract up to the time of trial. It is not a case involving an improper declaration of default and forfeiture. And as Judge Van Cott stated, (R. 169), all that plaintiffs had to do, in order to get all that they bought, was to make a legal tender, as distinguished from the lip tender that they testified to, and which defendants denied, and then demand their deed and if they didn't get it sue for specific performance. Instead of that they wanted their money back plus damages for breach of contract. This the trial court refused to give them and the evidence supports the judgment.

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Let us now proceed to consider the alleged errors.

THE TRIAL COURT PROPERLY FOUND IN FAVOR OF DEFENDANTS, NO CAUSE OF ACTION.

Appellants' first point is that the trial court erred in rendering a judgment "no cause of action" on the complaint for breach of contract; and that under the prayer for "such other relief as to the court may seem proper in the premises" the trial court should have proceeded to treat the case as a proceeding in equity for dissolution of a partnership, and, upon that basis, give plaintiffs some money judgment against defendants.

In effect appellants are asking this court to tell the trial courts of this State that the pleadings mean nothing so long as you include in your prayer a demand for general relief. That, of course, is not and never has been the law. The pleadings define the issues to be tried and limit the power of the court. In fact, a judgment which has no foundation in the pleadings, or goes beyond the pleadings, is a nullity.

Cooke v. Cooke, 67 Utah 371, 248 Pac. 83:

> "We, of course, must assume that the court made its order upon and within the issue presented by the petition and that it did not go beyond it. It matters not what court acts. Every court must acquire jurisdiction from its record which every court must have and keep and which binds the court; and there is no principle better established than what is not juridically presented cannot be juridically decided. Just as elemental is it that pleadings are the juridical means of investing a

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court with jurisdiction of the subject-matter to adjudicate it and that a judgment or decree beyond or not within them is a nullity, for the court is bound by its record. These are immutable elements.''

Stevens & Wallis v. Golden Porphyry Mines Co., 81 Utah 414, 18 Pac. 2d 903:

> ''It is of course familiar doctrine that the plaintiff cannot recover upon a different cause of action from that which is alleged, and that he must recover according to the allegations of his complaint; that courts cannot make the complaint for one thing stand for a different thing. In other words, the recovery must be secondum allegata et probata, and as was stated by Mr. Justice Swayne in the case of Washington, A. & G. R. Co. v. Bradleys, 10 Wall. 299, 303, 19 L. Ed. 894, that 'allegations and proofs must agree' and that 'averments without proofs and proofs without averments are alike unavailing,' and that the judgment must conform to the scope and object of the pleadings.''

Had the trial court, upon a complaint for money damages for breach of contract, entered a decree in equity for dissolution of a partnership which both parties alleged did not then exist, and upon that basis give a money judgment against defendants, such judgment would have had no foundation in the pleadings beyond the issues presented by the pleadings, and a nullity.

Neither party alleged that the partnership had been formed and that the property belonged to the partnership. Plaintiffs were not to have a half interest in the property until they had paid the full $9,000. Plaintiffs

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alleged that it was an oral contract for purchase of a half interest in the property and demanded damages for breach of the contract. They alleged that the partnership was to be formed after the purchase price was paid. Defendants admitted the original contract, denied that it had been modified, denied that defendants had breached the contract, and alleged that plaintiffs had themselves breached the contract as alleged in the answer. The defendants further alleged that in the meantime the parties had operated a joint enterprise, contributing equally to the expenses and sharing equally in the net proceeds, after payment of the expenses. This the trial court found to be true. Payment of the purchase price of the half interest was a condition precedent to the formation of the partnership, which was to be the relationship of the parties after plaintiffs had paid for their half of the property. There was ample evidence to sustain the finding of the trial court on this issue.

Nor is the evidence to the contrary. Appellant refers to the statement of defendant Elvis Hansen (R. 148) wherein he said, in answer to a question of counsel for plaintiffs, as follows:

"Q. He was to take care of the hogs?"

"A. It was a partnership."

A fair reading of the entire line of questioning shows that counsel was asking as to whether there was a division of responsibility in the doing of the chores and work about the place. The answer was merely the method used by the witness to state that in the doing of the work there

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was no division. Each was doing and responsible for helping with all of it. On the following page (R. 149) the witness clearly stated that the agreement was that the partnership agreement was to be drawn up after the remaining $5,000 was paid.

Also it will be observed that (R. 149) the Hansens had consulted Judge Allen of Murray about drawing up the papers to effectuate the deal; that he requested Mr. Young to see Judge Allen or have his attorney do so, but Mr. Young refused to do so. This was in January or February. Notwithstanding the fact that the November 15, 1948 payment had not been made by plaintiffs no default had been declared by the Hansens and notwithstanding the fact that some disagreements had arisen, the Hansens were willing to give the Youngs everything they were to get, if they would pay for it. But the Youngs did not want to go ahead with the deal. Instead they wanted their money back, plus damages for a purported breach of a purported modified contract; and so instead of going ahead and completing the deal they chose to file a suit for money damages. (R. 101)

Plaintiffs' whole idea, in the allegations of their amended complaint, in their theory at the trial, and on this appeal, is that because they paid $4060 on the purchase price of something that Mr. Young didn't want in the first place and wanted less after they had tried it for a few months, that they should be entitled to their money back as damages. In order to do this they concocted the idea of a modification of the agreement and then alleged that defenants had breached the agreement as modified.

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The alleged modification is silly in the extreme. It is no wonder the trial court refused to believe that by the modfication the Hansens agreed to convey the half interest for $4,000 and then let the Youngs pay the balance at the rate of $50 per month, when the contract called for them to pay the full $9,000 by November 15, 1948. The Youngs testified that they had the money and could have paid the balance. Why didn't they do it then? Because they didn't want to put any more money into it. They wanted their money out—not more money in (R.101—Testimony of Mr. Young).

Their amendment stating that they were willing to pay the balance was made at the time of trial. It was a last minute change of mind on the part of the Youngs—after they had repudiated the agreement themselves and had brought a suit for money damages for breach of contract. The Hansens were perfectly within their right in saying that they felt the Youngs had materially breached the contract and that they, by their breach, had absolved the defendants from the obligations of the contract.

The Youngs are not the only ones in the world who have bought something which they felt that they didn't want after they had made a partial payment on account. That is a common experience with most of us. Nor are they the first to try to get their money back after changing their minds. Most people who change their minds on those things find it difficult to get out of the obligation to pay the balance. But if they succeed in this lawsuit they will be the first litigants in history to obtain

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damages for their own breach from people who were not guilty of breaching the contract and who were ready and willing to go ahead with the contract right up to the time the suit was filed.

Let us hear Mr. Young speak as to what his attitude was early in the year 1948 when the Hansens were trying to get him to go down to see Judge Allen:

> "Q. Now, early in 1949, you were making demand upon the Hansens for your money back, were you not?
>
> "A. Yes.
>
> "Q. You demanded a note and mortgage upon the farm, did you not?"
>
> "A. Yes."

Counsel for appellant seems to be imbued with the idea that everyone who puts money into a proposition, regardless of the contract, is entitled to get his money out of it on some theory, regardless of the pleadings and evidence. All you have to do, according to his idea of law, is show that you paid in some money and then bring an action, regardless of the type, and then insert in the prayer a demand for general relief. From there on the trial court or the appellate court is supposed to take over as attorney for the plaintiff and give you something back, on the basis that the code has done away with the difference between law and equity, and something good should result. That, in effect, is what counsel for appellant is proposing to this court.

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There were no allegations in the complaint invoking the equity jurisdiction of the court, nor was any attempt made to state any cause of action in equity. It was purely and simply a cause of action for breach of contract. The necessary incidents of the agreement were alleged by both parties, the alleged breach by defendant and the claim for damages, and the alleged breach by plaintiffs. Those were the issues framed by the pleadings. The trial court found that plaintiffs had not established their case and ordered a judgment "no cause of action". Appellants say the court was in error.

In an action for breach of contract a judgment "no cause of action" simply means that the plaintiff has not proven his case. This court in the case of Mace v. Tingey, 106 Utah 420, 149 Pac. 2d 832, has directly ruled on this question wherein it said:

> "This brings us to the last assignment of error: that the verdict is contrary to, and not supported by, the evidence. *Of course a verdict for defendant 'no cause of action need not be supported by any evidence at all unless the answer is a confession and avoidance—one which puts the full burden of proof on defendant.* Is the verdict contrary to the evidence? Generally the donee has the burden of proving a gift. Blackburn v. Jones, 59 Utah 558, 205 P. 582; Ward v. Ward, 94 Or. 405, 185 P. 906. But when an action is brought to recover money alleged to have been loaned by plaintiff to defendant under an oral contract, and defendant claims the money was a gift, the plaintiff has the burden of proving the alleged oral agreement to repay. Payne v. Williams, 62 Colo. 86, 160 P. 196. Ordinarily there is no presumption against a gift. Jackson v. Lamar, 67 Wash.

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385, 121 P. 857. There was here no witness who testified directly as to the transaction. Plaintiff produced witnesses, beneficiaries under the will, or relatives, who testified that defendant told them the money was a loan and that she should have signed a note. The so-called 'dead man statute,' Subdivision 3 of 104-49-2 U.C.A. 1943, was invoked by plaintiff to prevent defendant testifying as to what actually occurred when the money changed hands. Defendant, as a witness however, denied making the statements attributed to her by plaintiff's witnesses. She offered a witness who corroborated her denial that she had stated the money was a loan; another witness testified that deceased had told him she had given defendant the money. Evidence, some phases of which we have discussed in connection with other questions, was offered by both sides relative to the relationship between deceased and the beneficiaries under the will; also between deceased and the defendant. *There was a direct conflict in the evidence as to whether the transaction was a loan or a gift. The question was properly submitted to the jury. If found for defendant, no cause of action. The verdict is not contrary to the evidence.*"

Of course the case at bar does not rest on failure of proof on the part of defendants. There is competent, affirmative evidence to support the findings and judgment.

The trial court disposed of all of the issues raised in the case and presented by the pleadings. Now defeated on the action, pleadings and the case presented, and all of which was chosen by them, appellants seek by this appeal to present another matter (whatever it is) without issues or evidence. Miller v. Johnson (on Rehearing),

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43 Utah 468, 134 P. 1017. Appellants further set up certain facts as the gospel truth but it is evident from the judgment that the trial court failed to entertain that view. As claimed by appellants, respondents did come to issue with them upon the various items, not of account as now they are designated but of damages, and appellants failed in their action.

The relief in any action must be consistent with the issues presented and the case made and even under the liberality of the Code a plaintiff may not plead his action, frame his issues at his own election, and then upon failure, without amendment, abandon the case made and framed by him and recover in a different form of action than the one he selected. This has been consistently true since the time of the adoption of the Code. Davis v. Utah Southern R. Co., 3 Utah 218, 2 Pac. 521.

IS THE CONCLUSION THAT THE DEFENDANTS DID NOT VIOLATE THE TERMS OF THE AGREEMENT ERROR?

The trial court concluded as a matter of law that defendants had not violated the contract.

This conclusion of law was based upon Findings of Fact III, IV, V, VI, VII and VIII, wherein the court found that the contract had *not* been modified as alleged and claimed by plaintiffs, and wherein the court found the facts showing full anl substantial performance by defendants of all that they had agreed to do, and wherein the court found that the plaintiffs themselves breached the agreement.

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Defendants were to do nothing further with reference to conveying the title until plaintiffs paid the balance.

What are the breaches of contract alleged in the amended complaint?

(a) Refusal to make the deed, bill of sale and partnership agreement in July, 1948, upon payment of the $4,000.00.

(b) Refusal to make the deed, bill of sale and partnership agreement in November.

(c) Refusal to make the same in February and repudiation of the agreement by demanding that plaintiffs move.

All of these allegations of breach were predicated upon the theory that defendants breached the alleged modification. In other words, they claimed that defendants refused to make the deed upon payment of $4060.00 and permit plaintiffs to pay the balance at $50.00 per month.

When the trial court found that no such contract existed as claimed by plaintiffs, it follows as a matter of course that defendants could not and did not violate a provision which did not exist.

It certainly cannot be contended that there is no evidence to sustain the finding that the original contract was not modified.

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Defendants testified that in January and February, in fact before that, they hired Judge Allen of Murray to prepare all of the papers upon the assumption that plaintiffs intended to pay the balance, but plaintiffs refused to go see Judge Allen or have their attorney see him. They would have none of it. They had in mind getting their money back.

Defendants denied that plaintiffs had ever made any tenders of money to them.

Defendants not only were willing to go ahead with the deal up to the time of filing the action, had never declared any default, but had engaged a reputable lawyer to prepare the papers. That is the very essence of good faith. They were more than indulgent of the failure of plaintiffs to pay.

But when someone in default in payments brings a suit against you for return of his money, plus damages, repudiates the contract and claims that you made a contract that you did not make, all for the purpose of getting out of a deal and getting his money back, that is a different matter. Defendants' testimony that he was not willing to go ahead was his evidence as to his attitude at that time—not his attitude before the suit. Under the law he was justified in regarding the suit for breach of contract, coupled with the failure of plaintiffs to pay or tender payment as a material breach of the contract, which it was.

Whether plaintiffs have any other, different, or further remedies in the light of the present situation is not

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before this court for decision. The sole question is: did defendants violate the contract as proven so as to make them liable in damages? The evidence supports the judgment and decision of the trial court that they did not.

THE CONCLUSIONS OF LAW ARE PROPERLY SUPPORTED BY THE FINDINGS OF FACT.

It is fundamental that the support of a Conclusion of Law rests within the Findings of Fact. It is submitted, and it is apparently conceded, that the Findings herein support the Conclusions of Law.

THE TRIAL COURT'S JUDGMENT ON QUESTIONS OF FACT WILL NOT BE DISTURBED UNLESS MANIFESTLY ERRONEOUS.

Appellants' points 4, 5, 6, 7 and 8 of their argument are all directed at certain Findings of Fact as made by the trial court. It has been firmly and definitely settled over a long period of time by this court that the trial court may determine the facts and judge the credibility of witnesses, and, if supported by any substantial evidence, the finding of fact will not be disturbed on appeal. DeCorso v. Booth, 97 Utah 145, 91 Pac. 2d 449; Farrel v. Cameron, 98 Utah 68, 94 Pac. 2d 1068; Romney v. Covey Garage, 100 Utah 167, 111 Pac. 2nd 545; Yowell v. Occidental Life Ins., 100 Utah 120, 110 Pac. 2d 566. As a matter of fact in DeCorso v. Booth, supra, this court stated that this rule is so well settled "that citation of authorities should not be necessary."

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As point 4 of appellants' argument it is contended that there is no evidence supporting that of Finding III that "when plaintiffs paid the defendants the sum of $9000.00 * * * that the parties would then enter into a partnership agreement" and that there is no evidence "That the said $9000.00 should be paid to defendants on or before November 15, 1948." As to substantial evidence supporting these findings the court's attention is invited to the following:

"Q. I'll ask you to state, Mr. Hansen, whether or not you ever had an arrangement with the Youngs for the payment of fifty dollars a month commencing on November 15, 1948?

"A. No, sir.

"Q. And did you ever have an agreement for the payment of that sum subsequent to that time?

"A. No, sir." (R. 135)

"Q. All right, after this agreement when were you to give him the title?

"A. When the nine thousand dollars was fully paid—on November 15th or right after.

"Q. Didn't he offer to pay you the the balance of the nine thousand dollars right after November 15th if you would have the papers made out?

"A. No, sir." (R. 146)

* * * * *

"Q. And in what way? (Was he getting jittery)
"A. Because at the end of November 15th when the deal was to be closed, it hadn't been closed." (R. 147)

* * * * *

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"Q. Now do you recall, Mrs. Hansen, what the agreement was as to how that nine thousand dollars was to be paid?

"A. The way I understood it, it was supposed to be paid on or shortly after the 15th of November." (R. 154-155)

* * * * *

"Q. Now in this original agreement, suppose their house wasn't sold by November 15th, what was the arrangement?

"A. The understanding that I had was that Mr. Young would get it through other sources." (R. 158)

Appellants fail to argue Assignments of Error 5 and 6 and no reply is necessary by respondents.

In Assignment of Error No. 7 it is claimed that there is no evidence to support Finding VII that the net proceeds of the joint operation and the expenses were divided equally between the parties. As to substantial evidence supporting this finding the court's attention is invited to the following:

"Q. And what happened to that livestock?

"A. It was sold, except the rabbits, and equally divided.

"Q. And did Mr. Hansen receive half of the money that you received for that livestock?

"A. Mr. Hansen or Mr. Young?

"Q. I mean the plaintiff.

"A. Mr. Young received half.

"Q. In every case?

"A. In every case except one.

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"Q. And what one was that?

"A. That was the last amount of pigs that I sold when he accused me of selling them and never giving him the money. It was sold on his own request.

"Q. What happened to the money?

"A. I kept it for the expense of the truck that accumulated in the year's time or in the time.

"Q. Was it your truck that was being used all of this time?

"A. Yes,sir. In fact two of them.

"Q. Two of your trucks?

"A. Two trucks." (R. 138)

As point 8 of appellants' argument it is contended that there is no evidence to support making a part of Finding No. VIII, that on or after November 15, 1948 plaintiffs failed, neglected, and refused to pay the balance of said purchase price. As to substantial evidence to support this finding the court's attention is invited to the following:

"Q. Was the balance of five thousand dollars ever paid?

"A. No.

"Q. Was it ever offered to you prior to the commencement of this action?

"A. No, sir.

"Q. And never during the times mentioned here today has that been offered to you, is that correct?

"A. No, sir." (R. 135)

* * * * *

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"Q. In regard to the fifty dollar matter, was there any payments of fifty dollars ever offered to you?

"A. No, sir." (R. 136)

* * * * *

"Q. All right, after this agreement when were you to give him the title?

"A. When the nine thousand dollars was fully paid on November 15th or right after.

"Q. Didn't he offer to pay you the balance of the nine thousand dollars right after November 15th if you would have the papers made out?

"A. No, sir." (R. 146)

* * * * *

"Q. Do you know if the balance of five thousand dollars was ever paid?

"A. No, sir.

"Q. Do you know if it was ever offered to your husband?

"A. No, sir.

"Q. Was there any of it after the 15th of November ever offered or paid to you?

"A. No, sir.

"Q. Was there any ever tendered?

"A. No, sir.

The Court: I think you asked here if any of it was ever paid and she said, 'No, sir.'

"A. It has never been paid or been paid up to this date.

"Q. And I think I asked you has it ever been tendered?

"A. No." (R. 155-156)

Appellants here have done exactly what this court detected in the De Corso case, supra. Appellants complain and assail the findings of the trial court because

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it adopted the defendants' evidence with respect thereto rather than that adduced by plaintiffs upon the subject.

It is submitted that all of the findings of fact attacked by appellants are well supported by substantial evidence to maintain them and this court, in a law action, is bound by these findings and it is not a basis of reversal, even, in the words of the Yowell case, supra, "If we are inclined to arrive at a different conclusion than the trial judge. Fee v. National Bank, 37 Utah 28, 106 Pac. 517."

RECEPTION OF EXHIBIT I WAS PROPER

Counsel for appellants reads a great deal of his own wishful thinking into the evidence and it is his own conclusion and that of no one else that Exhibit I was an attempt for a compromise settlement. Nowhere in the evidence does it appear that these parties were engaged in or negotiating for any kind of a settlement and no spirit of compromise and settlement pervaded the occasion. It was no offer but the presentment of a claim and demand. Appellants voluntarily presented to the Hansens a statement concerning their alleged claims. As a matter of fact the Exhibit was introduced only to show the great difference between the demands of their action, the demands as shown by their evidence and their previous demands. It simply discredited appellants as to the knowledge of truth of their testimony and sworn complaint. It was evidence of an independent fact which is certinly and properly admissable.

The foundation for reception of Exhibit I was properly laid by showing that it was presented as a computation and demand. (R. 102-104)

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CONCLUSION

This appeal has two purposes: (a) to have this court reverse the trial court on its findings that the contract was never modified as alleged by the plaintiffs and denied by the defendants; or to reverse the finding that the defendants did not breach the contract; or (b) to send the case back on some theory, regardless of what it may be, so that it can be retried on some theory other than breach of contract, the theory upon which it was filed and tried. We respectfully submit that in a law case involving breach of contract the only question before this court on the two main questions is as to whether there was substantial competent evidence to support the judgment. The two principal issues were: What was the contract, and did the defendants breach it so as to make them liable in damages? Upon those issues the evidence was in conflict and the trial court found that plaintiffs had not sustained the burden of proof. So far as this case is concerned that is where it should begin and end.

This is not so much an appeal by appellants upon the real merits of the case as framed by the pleadings and tried by the court, but an attempt on the part of appellants to impress this court with the fact that somehow in some action not before the court they should get their money back, plus damages, and they wander in the wilderness, quoting at random from bits of evidence, mostly their own, seeking a guiding hand and advice from this court as to how they shall proceed to accomplish their purpose which has been, ever since they could not sell

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their State Street home for $16,000.00, how to get their money back rather than to fulfil their contract.

Why was this lawsuit started? The Hansens never declared a default notwithstanding the failure to pay on November 15, 1948. They had placed the matter with Judge Allen of Murray to prepare the papers, notwithstanding some minor differences had arisen. One of the papers to be drawn was the partnership agreement, which obviously took a consultation with both parties. The Youngs were notified of this. Mrs. Young so testified (R. 122). They never went near Judge Allen. It seems strange that the attorney for plaintiffs never contacted him before bringing a lawsuit, if they wanted to go ahead with the contract. That was not what they wanted. The record is replete with evidence of both parties that from November 15, 1948 on the only interest of the Youngs was in getting their money back plus an accounting for the joint venture. They demanded it time and time again, according to the evidence of both parties. We have no doubt, if the Youngs sincerely wanted to perform their contract and complete the purchase of their half interest, that a simple effort in that regard with Judge Allen would have produced the deed and an agreement for further operations if it was still desired. But that was not what the plaintiffs wanted. They wanted their money out—not more money in. That is why they brought an action for breach of contract instead of specific performance with a tender of the balance due. According to the testimony of Mr. Young (R. 76), Mr. Hansen even offered to stand half of any loss in dis-

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counting the contracts which Mr. Young had with Dr. Marlin if the Youngs would go ahead, but the Youngs didn't want to go ahead—they wanted to call it off and get a note and mortgage from the Hansens. That is why the lawsuit for money damages for purported breach of contract was filed instead of making an effort with Judge Allen to get the papers completed. When they breached and repudiated the contract themselves, not only by failing to pay but by demanding that defendants repay them their money and respond in damages, and then started a lawsuit upon the basis of a contract that never existed and alleged breach of contract that never existed, they placed themselves in a position where, so far is this case is concerned, they must stand or fall on the law case for breach of contract. Whether they do or do not have some other or different remedy in the light of their conduct is not before this court on this appeal. The only question before this court is: Are they entitled to recover for breach of contract as alleged? We respectfully submit that there was ample evidence to support the findings and decision of the trial court that they are not.

Throughout his brief, appellants' counsel has related evidence favorable to his clients, primarily from his own clients. In each and every material fact related by him such evidence stands in the record postively and categorically denied by evidence of the Hansens. Of course, the ultimate purpose of counsel is to impress this court of claimed equities in favor of his clients. These respondents submitted to the issues presented. Had the action been of some other nature, it is not only conceiv-

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able but evident that equities in respondents' favor would also have appeared. An illustration of one of these facts is the statement that appellants were willing to perform. The Hansens denied this statement. It appears that Mr. Young was forced into unhappy and undesirable arrangement by his wife (R. 165, 92) and after a short experience tried to get out of it, even to the point of commencing litigation against his friends.

Respondent cannot urge too strongly that appellants failed in one thing, and that was to sustain their own action that respondents had breached their agreement. The issue was that simple.

The Hansens never suggested nor commenced litigation over this problem, but this costly action wrongfully initiated by the Youngs has been cast upon them. It is surely no valid complaint that the one sitting in judgment failed to be impressed by the story of plaintiffs.

It is submitted that there was no error and that the trial court should be affirmed.

Respectfully submitted,

RICH AND ELTON,
Attorneys for Respondents.

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